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No. 02-1667

IN THE
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ALABAMA, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), to the extent it applies to the accessibility of public buildings, exceeds Congress's authority under Section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the States' sovereign immunity from private damages claims.

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioner urging reversal of the judgment of the United States Court of Appeals for the Sixth Circuit. As sovereign States, *amici* have a strong interest in preserving the principles of dual sovereignty that are "a defining feature of our Nation's constitutional blueprint." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). Accordingly, *amici* have a powerful interest in ensuring that Congress's power to abrogate their sovereign immunity remains within the bounds

set by the Constitution, and is therefore circumscribed in a manner that recognizes the extraordinary nature of such an abrogation.

On a more practical level, *amici* have a strong interest in avoiding the litigation of private damage claims based upon Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"). This is particularly true of claims that seek damages for a State's alleged failure to make a public building sufficiently "accessible" to satisfy the legitimate desires of all disabled citizens to get themselves into and out of public spaces. As detailed below, virtually all of the States, including these *amici*, have undertaken significant efforts in the past several years to make their public buildings more accessible. However, as a matter of policy, *amici* believe that private federal damage actions against the States, with their attendant costs and risks to state taxpayers, are not warranted. That is particularly true given the absence of any evidence that the States' management of public buildings routinely violated the *constitutional* rights of the disabled prior to the ADA's passage, or that it does so today.

That is not to say that any State is, or should be, allowed to discriminate against the disabled with impunity. When States violate Title II or the Constitution, federal courts may issue declaratory and injunctive relief. See *Ex Parte Young*, 209 U.S. 123 (1908). Nor do *amici* contend that they should never be liable for money damages for violations of Title II of the ADA. Sovereign immunity does not apply to suits brought by the United States. And a State, in the exercise of its sovereign powers, may waive its sovereign immunity to private suits for damages under the ADA. But the abrogation of sovereign immunity at issue here–particularly with respect to claims challenging the accessibility of State-owned or operated buildings–is neither within Congress's authority under the Fourteenth Amendment nor necessary as a matter of policy.

STATEMENT OF THE CASE

To avoid burdening the Court with another recitation of the facts, *amici* adopt the statement in Petitioner's brief. However, two points deserve particular emphasis.

First, nothing in Respondents' allegations–which of course must be accepted as true given the posture of this case–suggests that they were ever denied access to any Tennessee courthouses altogether. To the contrary, Respondent Lane's complaint confirms that, when he was unable to access particular rooms in a court building on his own, he was offered alternative means of access. These included the option of being carried up the stairs by security personnel and the option of having the hearing relocated to a more accessible room or building. See Pet. App. 15 & 16. There is no allegation that any of these options would have prevented him from participating fully in the pertinent proceedings, or would have placed him in any danger.

Second, like virtually all other States, the State of Tennessee voluntarily requires, as a matter of state law, that courthouses and other public buildings be made accessible to disabled persons. See Tenn. Code Ann. § 68-120-204 (2003). Indeed, the record reflects that one of the courthouses at issue in this dispute was retrofitted with an elevator after some of the events of which Respondents complain, but before the filing of the present lawsuit. Pet. App. 17.

SUMMARY OF ARGUMENT

I. Under certain narrow circumstances, Section 5 of the Fourteenth Amendment empowers Congress to abrogate a State's immunity from liability for violation of federal remedial legislation. Although *amici* support Petitioner's request that Title II's purported abrogation of sovereign immunity be invalidated in its entirety, the Court need not go that far here. The only question the Court need address in this

case is whether Congress validly acted within its Section 5 authority in attempting to abrogate States' immunity for alleged violations of Subtitle A of Title II, and only insofar as those provisions apply to the physical accessibility of public buildings.

Of course, the mere invocation of Section 5 does not effect compliance with the Fourteenth Amendment. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 637-39 (1999). A court must determine whether Congress acted within its Section 5 authority by examining for itself whether the attempt to abrogate satisfies the requirements announced in *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997) (plurality op.); see also *Board of Trustees* v. *Garrett*, 531 U.S. 356, 365 (2001). Here, Congress's attempt to abrogate the States' sovereign immunity for alleged violations of Title II, Subtitle A, is invalid, at least as to claims challenging the accessibility of public buildings, for two fundamental reasons.

First, looking to the "metes and bounds" of the "constitutional right in question," *id.* at 368, there is no general constitutional right to public buildings that are physically "accessible" to the disabled, however desirable such accessibility is as a matter of policy. A government's failure to make a public building satisfy modern standards of accessibility does not violate the Fourteenth Amendment's Equal Protection Clause as long as that failure has a rational basis – which cost considerations alone will almost always provide. And a government's failure to make a public courthouse accessible (in the modern sense) does not violate the Due Process Clause as long as the government is willing, as it was here, to provide alternative means for a disabled person to participate meaningfully in any proceedings in which he is involved.

Second, in addition to the "proportionality" concerns addressed in Petitioner's brief, there simply is no "congruence" between Congress's findings and the alleged

constitutional violations that the accessibility features of Title II are designed to remedy. See *City of Boerne*, 521 U.S. at 519-20. Neither the statutory text nor the legislative record reflects any congressional finding of a history or pattern of constitutional violations on the part of States. And even had Congress identified such a pattern, Title II's remedies fail the "congruence" requirement because they are not linked to, or justified by, any identifiable course of unconstitutional State conduct.

Because these considerations compel the conclusion that Congress did not act within its authority in abrogating the States' sovereign immunity with respect to accessibility claims under Title II, that immunity (as reflected in the Eleventh Amendment) precludes private suits for damages under that statute.

II. Constitutional considerations aside, Title II's purported abrogation of State sovereign immunity from suits involving access to public buildings is unnecessary as a practical matter. First, virtually every State in the Union already guarantees disabled persons access to public buildings. Moreover, private damages actions to enforce the federal guarantee would more likely undermine than advance the ADA's goals. It would divert scarce resources from affirmative remedial measures to defensive litigation, and it would tend to eliminate the States' incentives to provide even stronger protections for the disabled under state law.

Second, to the extent State guarantees of access are thought insufficient, the other remedies afforded by Title II (assuming it is a valid exercise of Congress's Article I power) provide more than adequate reinforcement. The principal remedy, injunctive relief, is ideally suited to right the wrongs at issue. In virtually all imaginable cases, restricted access to public buildings can be alleviated by a stroke of the judicial pen. Title II's other enforcement provisions, including federal administrative enforcement with the possibility of civil

penalties, are also better suited to promoting Title II's goals than the prospect of potentially devastating civil liability.

ARGUMENT

I. CONGRESS ACTED BEYOND ITS SECTION 5 POWER WHEN IT PURPORTED TO ABROGATE THE STATES' SOVEREIGN IMMUNITY FOR CLAIMS ALLEGING A FAILURE TO MAKE PUBLIC BUILDINGS ACCESSIBLE.

To determine whether Section 5 legislation validly abrogates the States' sovereign immunity from damage actions, this Court applies the tripartite test announced in *City of Boerne*, 521 U.S. at 519. See *Garrett*, 531 U.S. at 365. First, a court must "identify with some precision the scope of the constitutional right at issue." *Id.* Second, once a court determines the "metes and bounds" of that right, it examines "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States." *Id.* at 368. Third, if (and only if) there is a pattern of identified unconstitutional conduct on the part of the state, a court determines whether there is "a *congruence* and *proportionality* between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520 (emphasis added); see also *Florida Prepaid*, 527 U.S. at 639.[1]

Although Title II covers a wide range of qualitatively different activities, this case involves only one category of covered issues, namely, the accessibility of public buildings. Accordingly, as explained below, the Court can choose to address the constitutionality of Congress's attempt to

[1] Because the Petitioner's brief discussed the proportionality issue at some length, this brief will focus principally on the "congruence" requirement, and on the implications of that requirement for the kind of legislative record that Congress must have to abrogate the States' sovereign immunity from private damage suits.

abrogate sovereign immunity only for that type of claim. It can thereby leave for another day the constitutionality of Title II's abrogation of sovereign immunity for such things as the accessibility of transportation equipment and the statute's more general prohibition on discrimination against the disabled. See, *e.g.*, 42 U.S.C. §§ 12142, 12143 (mandating that public transit systems be made accessible to disabled persons), 12162 (mandating that intercity rail transportation be made accessible to disabled persons). Such an approach would be in keeping with the Court's decision in *Garrett* to address only the constitutionality of the statute's abrogation of sovereign immunity with respect to claims under Title I, rather than addressing the constitutionality of that abrogation with respect to the entire statute. See *Garrett*, 531 U.S. at 360 n.1.

A. This Court Can Appropriately Resolve The Constitutionality Of Title II's Abrogation Of Sovereign Immunity As Applied Only To The Accessibility Of Public Buildings, And Leave For Another Day The Constitutionality Of Abrogating Sovereign Immunity From Suits For Other Alleged Violations Of Title II.

Although Petitioner makes a compelling case that Title II's abrogation of sovereign immunity is invalid in its entirety, several considerations support a category-by-category approach to addressing the constitutionality of Title II's various abrogations of sovereign immunity. Whereas Title I deals exclusively with a single activity – employment – Title II encompasses a broad spectrum of distinct activities, ranging from providing transportation services to making public buildings accessible. Because the activities at issue in Title II differ qualitatively from one another, it is conceivable that Congress could have made findings that are adequate to support an abrogation of sovereign immunity with respect to one activity but not others. Conversely, congressional findings with respect to one activity cannot support the

abrogation of sovereign immunity with respect to another, qualitatively different activity.

Indeed, allowing Congress to leverage a proper finding of unconstitutional conduct in one area into a justification for abrogating sovereign immunity in another area would be flatly contrary to this Court's requirement that there be a "congruence" between valid congressional findings and the abrogation of sovereign immunity. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966) (to be congruent, a law must be "aimed at areas where [the constitutional violation] has been most flagrant"); *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1993 (2003) (Kennedy, J., dissenting). For example, Congress might (theoretically) find a pattern of unconstitutional activity in the provision of public transportation services, which is governed by Subtitle B, but not with respect to access to public buildings, which is governed by Subtitle A. Then, even though these two classes of activity have no apparent ground in common, Congress could – by the mere expedient of drafting a statute broad enough to embrace them both – effect an abrogation of sovereign immunity that reaches well beyond the predicate pattern of unconstitutional behavior. Such a result would plainly violate this Court's congruence requirement. Moreover, if this Court were to indicate that it will review such overly inclusive statutes *in toto* for purposes of Eleventh Amendment analysis, Congress would have an incentive to use legitimate findings of unconstitutional behavior by the States as springboards for sweeping eliminations of sovereign immunity.

That is why the Court has traditionally resisted allowing Congress broadly to abrogate sovereign immunity. For example, in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), Justice Harlan distinguished his vote to strike down a New York state literacy test from his previous vote to uphold a similar law in South Carolina. See *Hibbs*, 123 S. Ct. at 1993-94 (Kennedy, J., dissenting) (discussing Justice Harlan's

voting justifications). In *South Carolina* v. *Katzenbach*, 383 U.S. at 315-23, based on "'voluminous legislative history'" with respect to voting rights, Justice Harlan had upheld strong remedial measures, including the suspension of literacy tests. *Morgan*, 384 U.S. at 667 (Harlan, J., dissenting). In *Morgan*, however, Justice Harlan voted to invalidate a similar federal ban on New York state literacy tests based on a lack of a showing that "there ha[d] in fact been an infringement of [a] constitutional command." *Id.* Thus, in *South Carolina* v. *Katzenbach* and in *Morgan*, Justice Harlan reached different conclusions about the constitutionality of related voting activities based solely on the "congruence" between congressional findings of unconstitutionality and the activity at issue. Such a specific inquiry is necessary here as well, regardless of whether the Court addresses the entirety of Title II or limits its inquiry to the accessibility of public buildings.

This Court, moreover, has never addressed, much less upheld, the abrogation of the States' sovereign immunity for a statute as broad as Title II of the ADA. In previous cases the Court has addressed the abrogation issue in limited activities, such as voting preclearance (*City of Rome* v. *United States*, 446 U.S. 156 (1980); *Gatson County* v. *United States*, 395 U.S. 285 (1969); *South Carolia* v. *Katzenbach*, 383 U.S. 301 (1966)), religious exemptions (*City of Boerne* v. *Flores*, 521 U.S. 507 (1997)), employment discrimination (*Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001)), Indian gaming (*Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996)), patent infringement (*Florida Prepaid*, 527 U.S. at 640), and employment family leave (*Nevada Dep't of Human Res.* v. *Hibbs*, 123 S.Ct. 1972 (2003)). As in these previous cases, an activity-by-activity review under Title II makes sense because it allows an appropriately particularized examination of the Congressional record for each activity. Otherwise, Congress would be able to abrogate sovereign immunity for actions lacking any pattern of discrimination simply by including

them in same legislation as unrelated activities for which a pattern of discrimination exists.

Finally, category-by-category review of Title II's various abrogations of sovereign immunity also furthers the doctrines of constitutional avoidance and separation of powers. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). But broad-brush review of the entire Title II scheme would require courts to ratify (or not to ratify) the constitutionality of all of the immunity-abrogating provisions in the Title, thereby addressing a broader range of constitutional questions than necessary to resolve a particular case.[2]

To be sure, the Court is free to take the contrary approach and to decide, once and for all, whether Title II validly abrogates the States' sovereign immunity as to any and all of the activities that fall within the statute's scope. Indeed, the reasons why Title II does not validly abrogate a State's sovereign immunity as to the accessibility of public buildings may also compel the conclusion that Congress exceeded its authority in abrogating sovereign immunity as to other categories of activities. But the Court is not compelled to reach that question in this case, any more than it was compelled in *Garrett* to address the abrogation of sovereign

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[2] For these reasons, at least two circuits have examined the constitutionality of Title II's abrogation of sovereign immunity on a category-by-category basis, rather than examining the entire statutory scheme *in toto*. *See Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 703-04 (4th Cir. 1999) (noting that an examination of Title II's provisions separately advances doctrine of constitutional avoidance and examination of the entire Title *in toto* is "fundamentally at odds with separation of powers values"); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1006-07 (8th Cir. 1999) (declining to examine statute as whole for Section 5 inquiry based on doctrine of constitutional avoidance).

immunity with respect to claims other than those arising under Title I.

B. While Unfortunate, The Failure To Outfit Courthouses And Other Public Buildings So That Persons Of All Disabilities May Access Them Without Assistance Violates Neither Due Process Nor Equal Protection.

Category-specific analysis of Title II's abrogations of sovereign immunity also facilitates analysis of the first inquiry required by *Boerne* and *Garrett*, namely, to "identify with some precision the scope of the constitutional right at issue." See *Garrett*, 531 U.S. at 365. This analysis, moreover, must reflect the reality that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Hibbs*, 123 S.Ct. at 1977 (quoting *Kimel*, 528 U.S. at 81).

Here, the plaintiffs have alleged two constitutional rights: the right to be free from invidious discrimination prohibited by the Equal Protection Clause, and a due process right to attend court proceedings. As shown below, under this Court's decisions, neither of these theories creates a general constitutional right to unassisted access to public buildings or to specific portions of public buildings.

1. A State's Rational, if Unfortunate, Decision Not to Make Public Buildings Fully Accessible to Persons of All Disabilities Does Not Constitute an Equal Protection Violation.

In the equal protection context, this Court in *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), rejected the argument that classifications based on disability are subject to heightened scrutiny. Instead, regulations concerning the disabled as a class are entitled only to rationality review. *Garrett*, 531 U.S. at 367. Accordingly, they "cannot run afoul of the Equal Protection Clause if there

is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe*, 509 U.S. 312, 320 (1993).

But that, of course, means that the Equal Protection Clause of the Fourteenth Amendment does *not* require States to make special accommodations for the disabled, provided their actions toward the disabled are rational. See *Garrett*, 531 at 364. Thus, as the Court observed in *Garrett*, "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 368. In other words, a State does not run afoul of the Equal Protection Clause by failing to accommodate the disabled, so long as it has a rational basis for doing so. *Id.* at 367.

It follows from this analysis that the real constitutional right at issue here is the right to be free from a failure by the States, without a *rational* basis, to make special accommodation for the disabled with respect to accessibility of public buildings. But a State might have numerous rational reasons for failing to make public buildings fully accessible to persons of all disabilities. Chief among these is that, faced with limited resources, a State may rationally choose to fund other priorities, such as college scholarships for the disabled, or even compliance with other requirements imposed by the ADA. Whether these decisions are right or wrong as a matter of policy, they plainly would not constitute a constitutional violation under the deferential rational basis standard.

This conclusion is illustrated by the facts of this case. Neither of the plaintiffs has alleged, much less demonstrated, that the State of Tennessee lacked a rational basis in failing to make the public buildings at issue here accessible. Nor could such a showing be made: The buildings at issue were constructed before the Second World War, at a time when wheelchair ramps were virtually unknown and elevators were uncommon in small buildings. And even after this technology became more widely available and cost-efficient,

the State would have been required to spend substantial sums to retrofit the old buildings. Given other budgetary needs, the State's decision not to spend these sums was surely rational, even if most would agree it was bad policy.

2. A State Does Not Offend Due Process by Failing to Provide Unassisted Access to Courthouses, Because There Is No Absolute Right to Unassisted Attendance at Court Proceedings.

Respondents also claim that the alleged denial of ready access to the courthouse violates their due process rights. Thus, Respondents may argue that – at least as applied to public courthouses – Title II's abrogation of sovereign immunity is justified under the Due Process Clause of the Fourteenth Amendment. Determining whether that is true requires the Court to locate the contours of the due process right to be present at court proceedings.

First, there is no due process right to be present at a court proceeding in which one may have a pecuniary interest but to which one is not a party. This Court has never recognized such a broad right, and *amici* are aware of no lower federal court to have done so.[3] Thus, the abrogation of the States' sovereign immunity cannot be justified on the theory that a

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[3] *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), in which this Court held that the general public had a right to access a criminal trial, is inapplicable here. First, that case concerned only the guarantee (derived from the Free Speech Clause) of a "public trial" in general; it did not recognize an individualized personal right to attend trial. *Id.* at 571-74; *see also id.* at 584-85 (Brennan, J., concurring). Second, even as to that generalized public "right," *Richmond Newspapers* conferred only rational basis scrutiny. *See id.* at 583 (Stevens, J., concurring) (First Amendment prohibits "arbitrary interference with access to important information"); *id.* at 588 (Brennan, J., concurring). Finally, *Richmond Newspapers* involved only the State's power to close criminal trials to the public, and did not address civil trials. *See id.* at 580 n.17.

State's failure to make a public courthouse or other public building accessible to the disabled will violate due process by denying people like Respondent Jones an opportunity to ply their trade as court reporters. See Pet. App. 19-20.

Second, even as to parties in legal proceedings, there is no absolute right to attendance. To be sure, a criminal defendant generally has a due process right (stemming from the Sixth Amendment's Confrontation Clause) to be present in a criminal proceeding against him. See *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis* v. *United States*, 146 U.S. 370 (1892)). And indigent citizens have a due process right to be free of filing fees and other costs that would otherwise preclude their access to the courts. See *Boddie* v. *Connecticut*, 401 U.S. 371, 375-76 (1971).

It is well settled, however, that even these limited rights of access are subject to numerous exceptions. For example, as this Court has made clear, the notion that a "trial can never continue in the defendant's absence [has] been expressly rejected." *Allen*, 397 U.S. at 342 (citing *Diaz* v. *United States*, 223 U.S. 442 (1912)); see, *e.g.*, *id.* at 343-44 (recognizing at least three constitutionally permissible ways to exclude the defendant from the courtroom without violating his due process right to be present); *Snyder* v. *Massachusetts*, 291 U.S. 97, 118-20 (1934) (the right to be present may be lost); *Boddie*, 401 U.S. at 382 (right to judicial access is limited); cf. Fed. R. Crim. P. 43(b) (providing numerous instances in which presence of a defendant in criminal proceeding not required).

Maryland v. *Craig*, 497 U.S. 836 (1990), is illustrative. There, the Court held that denial of the opportunity to confront a witness did not violate a criminal defendant's due process rights where the State afforded him an alternate means to see the witness. *Id.* at 849-50. In so holding, the Court weighed public interest considerations against a defendant's right to be present. It concluded that the right to confront may be satisfied without a face-to-face confrontation

where denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured. *Id.* at 850. As Justice O'Connor wrote for the Court, "our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial.'" *Id.* at 849 (emphasis in original) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980)). Thus, where the State has an important policy interest, the preference for a defendant's face-to-face confrontation at trial can be overridden so long as alternate means exist to satisfy a defendant's right to confrontation.

Third, even if there were an absolute right to be present in a court proceeding, that is not the same thing as a right to be present *without assistance*. In this case, for example, the State afforded Respondent Lane two alternatives reasonably calculated to facilitate his presence. It offered to hold one of the proceedings in another facility that was accessible (the courthouse library, for example), and, if necessary, to have courthouse employees assist him upstairs to the courtroom. See Pet. App. 15 & 16. Either alternative would have allowed him to attend the proceedings in question.

Given these alternatives, the fact (if it is so) that the State did not afford Mr. Lane *unassisted* access to the courthouse had no effect on his ability to confront witnesses, refute claims against him or offer evidence in his behalf. To the contrary, the State attempted conscientiously to reconcile Mr. Lane's right to be present at the proceedings and the State's need to administer those proceedings in a cost-effective manner. Tennessee, in short, did not deprive Mr. Lane of due process.

Because the Due Process Clause does not require a State to provide unassisted access to public buildings, the Clause provides no basis for abrogating the States' sovereign immunity for alleged failure to make public buildings physically "accessible" to citizens with disabilities that prevent them from doing such things as climbing stairs. At a

minimum, that is certainly true where, as here, States provide alternative means by which these citizens can attend legal proceedings in which they are parties.

C. Neither The Statutory Text Nor The Legislative Record Of Title II Contains The Requisite Findings Or Evidence Of Past Unconstitutional Conduct By The States With Respect To The Accessibility Of Public Buildings.

Even if the failure to make public buildings accessible could be a constitutional violation, neither the text of Title II nor its supporting record is adequate to support the use of Section 5 to abrogate the States' sovereign immunity for the kinds of claims at issue here. As explained above, to satisfy the congruence requirement, Congress must identify a pattern of unconstitutional conduct by the States with respect to the activity covered by the statute. See *Garrett*, 531 U.S. at 370; *City of Boerne*, 521 U.S. at 530. And it cannot impute conduct by private actors to the States. See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (plurality op.).

Here, a review of the text and legislative record reveals no support for a history or pattern of purposeful discrimination against the disabled as to the accessibility of public buildings. Nor does the record support a finding that the disabled have suffered a pattern of due process violations at the hands of the States themselves.

1. Congress Failed to Identify Any History or Pattern of Equal Protection or Due Process Violations.

a. Much of the evidence cited in support of Congress's use of its Section 5 authority in the ADA consists of findings of "discrimination" against the disabled. See generally 42 U.S.C. § 12101. However, Congress's use of that term encompasses much conduct that is perfectly constitutional. There is no indication that the invocations of that term in (or in support of) Subtitle A of Title II referred to conduct that is

arbitrary or irrational conduct – a necessary condition for an equal protection violation. As discussed above, discrimination may be unenlightened but still minimally rational.

It is beyond dispute that Congress's authority to enact general remedial legislation under Section 5 is limited to rectifying conduct that is unconstitutional, not merely undesirable. Moreover, the mere fact that Congress states that particular conduct is unconstitutional does not make it so. See *Kimel*, 528 U.S. at 80.

More specifically, as discussed above, *Cleburne* compels the conclusion that a State may take account of disabilities, or refuse to accommodate them, as long as it has a rational basis for doing so. Thus, the fact that Subtitle A of Title II refers to "discrimination" against the disabled does not mean that Congress actually found a pattern of unconstitutional conduct. There is no congruence between that finding and Title II's abrogation of sovereign immunity for claims challenging the failure to make public buildings accessible.

b. The Act's text also contains a series of "Findings" explaining why it was enacted. See 42 U.S.C. § 12101. These findings generally express concern with discrimination on the basis of disability across a broad range of services and activities, including, *inter alia*, access to public services. See *id.* § 12101(a)(3); see also *id.* § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural, transportation, and communication barriers . . . failure to make modifications to existing facilities and practices . . .").

Here, the findings' sweeping language reveals a congressional intent to address not only discrimination that is purposeful or irrational, and therefore unconstitutional, but also discrimination that is entirely constitutional. For example, in Title II Congress has determined that

"discrimination" shall include differentiating on the basis of "race, color, sex, national origin, religion, or age" *and* disability. 42 U.S.C. § 12101(a)(4). Yet each of these forms of discrimination is reviewed differently under the Constitution, and most of these groups – unlike the disabled – receive strict scrutiny review as suspect classifications.

Again, discrimination on the basis of disability is subject to rationality review. And there are a host of rational, if debatable, reasons a State may choose not to take such actions. Thus, in asking this Court to treat Congress's finding of "discrimination" as a finding of unconstitutional conduct, then, respondents are effectively asking this Court to overrule *Cleburne* and treat disability as a suspect classification. Once again, there is no congruence between the findings and the abrogation of sovereign immunity to accessibility claims.

c. Nor does the legislative record otherwise indicate a pattern of unconstitutional conduct. To be sure, the *Garrett* dissent attached a list of 300 instances of alleged discriminatory treatment by state officials. *Garrett*, 531 U.S. at 370. But fewer than 20 percent of these anecdotes involve access to public buildings. And they consist entirely of such broad and nondescript statements as "inaccessible public buildings and services," "inaccessible courthouse," "inaccessible government buildings in Seward," and "inaccessible new performing arts center," *Id.* at 391-93 (Breyer, J., dissenting) (App. C). None provides sufficient factual detail to establish that the alleged denial of accessibility (if it occurred) was irrational, and therefore unconstitutional. This is especially true in light of the fact that, where rationality review applies, "the burden is on the one attacking" the government action" to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

In short, these examples are not even legislative findings, and are "so general and brief that no firm conclusion can be drawn" from them. *Id.* at 371 n.7.

d. udicial decisions likewise provide no support for a finding of widespread unconstitutional conduct. As some members of this Court have observed, evidence of a history or pattern of unconstitutional conduct on the part of the States may be found "in decisions of the courts of the States and also the courts of the United States." *Garrett*, 531 U.S. at 376 (Kennedy and O'Connor, J.J., concurring) (noting that "one would have expected to find . . . extensive litigation and discussion of the constitutional violations"). Here, however, there is a remarkable absence of judicial documentation of constitutional violations by the States against the disabled.

The dearth of lawsuits alleging unconstitutional conduct in the years immediately before Title II's enactment bolsters the conclusion that Congress did not have support for a finding of a history or pattern of unconstitutional conduct by the States. Stated differently, there is no congruence between the evidence and findings on which Congress relied, and its decision to abrogate sovereign immunity as to accessibility claims.

2. Congress Did Not Identify a Pattern of Discriminatory Conduct Attributable to the States Themselves.

In all events, it is well established that Section 5 legislation based on the unconstitutional conduct of local entities or private actors is insufficient to justify the extraordinary remedy of abrogating a State's sovereign immunity. "Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions." *Garrett*, 531 U.S. at 368 (citing *Florida Prepaid*, 527 U.S. at 640). Neither the text nor the legislative history of Title II supports the notion that the States

themselves engaged in any pattern of unconstitutional conduct.

a. As a threshold matter, the text is devoid of any mention of unconstitutional conduct attributable to the States. Instead, the statute alleges discrimination without mention of the culpable entities, instead naming "society" as being responsible for the conduct. See 42 U.S.C. § 12101(a)(2) ("historically, *society* has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities") (emphasis added). The text thus invites the conclusion that any pattern of unconstitutional conduct is a result of actions taken by private actors or local entities, not by the States.

b. Nor does the legislative record provide any support for a pattern of discriminatory conduct by the States, a fact that this Court observed in *Garrett*. See 531 U.S. at 369 (noting that "great majority of these incidents do not deal with the activities of States"). The legislative record suffers from the same shortcoming as the text in this regard: no nexus between the conduct that Subtitle A of Title II appears to treat as unconstitutional and any action on the part of the State.

Indeed, of the alleged instances of failure to make reasonable accommodations in public buildings, only a few isolated instances are even arguably attributable to the States. And those do not establish a pattern of unconstitutional conduct.

For example, in Alaska there were allegedly "inaccessible areas at [a] new Alaska Performing Arts Center." *Id.* at 392 (Breyer, J., dissenting) (App. C). But this brief description gives no information as to what areas were inaccessible, how they were inaccessible, what percentage of disabled persons could not gain access, or, most important, whether any rational reason existed for such inaccessibility.

Similarly, the record contains evidence that, in Georgia, the "University of Georgia located its office of handicapped services in inaccessible second floor office." *Id.* at 401. And in Mississippi there were allegedly "inaccessible classrooms and library at Mississippi School for the Deaf." *Id.* at 411.

But again, these anecdotes provide no indication of the extent of the inaccessibility, or whether the inaccessibility lacked a rational basis and was therefore unconstitutional. As the concurrence in *Garrett* put it, "[t]he failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause." *Id.* at 375 (Kennedy and O'Connor, JJ., concurring).

c. No other legislative findings support any unconstitutional pattern of conduct by the States themselves. The House and the Senate Reports, for example, do not mention a widespread pattern of unconstitutional discrimination on the part of the States. See S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485, pt. 4, at 24-25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 513-25. To the contrary, the House Report emphasized that the legislation was needed, not to address the conduct of the States, but because existing disability laws "do[] not apply to *private* sector entities that do not receive Federal funds." H.R. Rep. No. 101-485, pt. 4. at 24), *reprinted in* 1990 U.S.C.C.A.N. at 513 (emphasis added).

Indeed, many legislators congratulated the States on their leadership in protecting the rights of disabled individuals. See S. Rep. No. 101-116, at 92, 96 (Statement of Sen. Hatch). And others confirmed that, as described at greater length below, that many States' protection of the disabled was equal to, if not greater than, the ADA's. See 136 Cong. Rec. H2614 (daily ed. May 22, 1990) (Rep. Berman). Thus, the legislative findings suggest that, if anything, the States have

proactively protected the disabled, rather than unconstitutionally disregarded them.

* * * *

Because the legislative record neither attributes any history or pattern of unconstitutional conduct to the States *themselves* nor establishes support for the existence of such a history or pattern, Congress has exceeded its Section 5 authority to the extent it attempted to abrogate the States' sovereign immunity for failure to make public buildings accessible. There is, in short, no "congruence" between the findings and evidence in the legislative record and Congress's decision to abrogate the States' immunity as to that class of claims.

II. AS A PRACTICAL MATTER, THERE IS NO GOOD REASON TO ALLOW PRIVATE FEDERAL DAMAGE ACTIONS BASED ON THE ACCESSIBILITY OF PUBLIC BUILDINGS OWNED OR USED BY STATE GOVERNMENTS.

Abrogating the States' sovereign immunity with respect to accessibility claims is also unnecessary from a practical standpoint. As shown below, virtually every State in the nation already ensures, as a matter of State law, that the disabled have ample access to public buildings. And the ADA's provisions for injunctive relief and federal enforcement actions – assuming Title II is valid Commerce Clause legislation – afford more than adequate reinforcement.

A. Virtually Every State Already Has Statutes Or Regulations Requiring That Public Buildings Be Accessible To The Disabled.

As this Court observed in *Garrett*, "by the time that Congress enacted the ADA in 1990, every State in the Union had enacted" measures proscribing discrimination against the disabled. 531 U.S. at 368 n.5. This beneficent trend has continued since the ADA's passage, with a number of States adding new protections and strengthened existing remedies.

As to the accessibility of public buildings, as shown in the Appendix, virtually all States now specifically guarantee access to disabled persons.

1. Indeed, by the time the ADA was enacted, the States had already been voluntarily traveling "the path to a more decent, tolerant, progressive society." *Id.* at 375 (Kennedy, J., concurring). As the Court has observed, the States may be said largely to have charted the course. See *id.* at 368 n.5 (quoting statement of a congressional witness that the States prior to the ADA were "far out in front of the Federal Government"). Congress, then, in effect leapfrogged many State governments – and caught up with others – in creating the protections secured by the ADA.

To be sure, Congress's efforts in this regard are commendable. The ADA is, as Justices Kennedy and O'Connor termed it, "a milestone" on the road to a better society. *Id.* at 375 (Kennedy, J., joined by O'Connor, J., concurring). But Congress's awakening to the values embodied in the ADA – as to which the States, as noted, had led the way – is no warrant for the quantum step of exposing the States to private federal damages suits with respect to accessibility claims.

2. Further, such exposure would be more likely to undermine than to advance the salutary goals of both the ADA and corresponding State laws and rules. For one thing, enforcement of federal anti-discrimination law by way of private damages actions naturally tends to remove, or displace, the States' incentives to create their own such protections for their citizens. It is not advisable, in this important area of social policy, to shutter the laboratories of democracy – at least not without a strong indication that they are not doing the job. As noted above, the indications are distinctly to the contrary.

Equally important, the prospect (and before long the reality) of widespread and enormously costly damages suits

would necessarily divert the States' resources from remedial to defensive ends. Especially in view of the budget crises with which so many States are now struggling, it should go without saying that those resources are limited, indeed scarce. As this Court is well aware, there are few more voracious consumers of resources than private civil litigation.[4]

None of this is to say that existing State laws and rules fully eradicate the difficulties faced by disabled persons, or that further legislation in this area is not to be desired as a policy matter. But, as shown in the above discussion and in the attached appendix, existing State laws are sufficient to address the vast majority of accessibility problems. Moreover, they do so in a way that is tailored to meet the specific circumstances of each State's public buildings and facilities, as well as the requirements of each State's licensing and enforcement authorities.

Indeed, since the ADA's passage, several States have enacted new protections for the disabled or strengthened existing protections.[5]

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[4] *Cf. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 597-98 (1997) (discussing the "'objectionable aspects of asbestos litigation,'" as recounted by the ad hoc committee appointed by the Chief Justice to investigate the asbestos litigation crisis). In this regard, the magnitude of the pool of potential ADA plaintiffs should be kept in mind. The Act's definition of disability is extremely broad, embracing nearly 20 percent of Americans by Congress's own reckoning. *See* 42 U.S.C. §§ 12102(2) (defining "disability" within the meaning of the ADA), 12101(a)(1) (finding that "some 43,000,000 Americans," nearly 20 percent of the 1990 U.S. population, were disabled at the time of the ADA's passage).

[5] *See, e.g.*, Ark. Code § 19-4-1415; Fla. Stat. ch. 553.501-553.513; Ga. Code Ann. § 30-3-3; Haw. Rev. Stat. § 103-50; Ind. Code § 22-13-4-1.5; La. Rev. Stat. tit. 40 § 1734; Mo. Rev. Stat. § 213.065; Neb. Rev. Stat § 20-127; N.H. Rev. Stat § 155-A:5; N.Y. Pub. Bldgs. Law § 51; N.C. Gen. Stat. § 168-2; N.D. Cent. Code § 48-02-19; Ohio Rev. Code Ann. § 3781.111; Or. Rev. Stat. § 447.220; R.I. Gen. Laws § 37-8-15; S.D. Codified Laws § 5-14-13; Vt. Stat. Ann. tit. 21 § 273; Va. Code Ann. § 2.2-1159; Wash. Rev. Code § 70.92.110; Wis. Stat. § 101.13.

In short, a federal right of action for private damages against the States would not further, and could well hinder, the goals embodied in Title II of the ADA.

B. The Potential Availability Of Injunctions And Federal Enforcement Actions To Require Compliance With Title II Provides Ample Additional Assurances Of Accessibility.

Nor must disabled persons rely solely upon State law to ensure the accessibility of public buildings. To be sure, this Court has not yet had occasion to decide whether the other provisions of Title II are a valid exercise of Congress's Article I power as applied to the States. Assuming they are, however, the Court's evaluation of the practical necessity of a federal right of action for damages must take account of the other remedies provided by the statute. In view of those other remedies, it is clear that private damages actions are not the optimal means – indeed, are not necessary – to further the Act's goals.

1. The principal remedy, of course, is injunctive relief. See 42 U.S.C. § 12133 (incorporating by reference 42 U.S.C. § 2000e-5(g)) (providing for injunctions to enforce compliance with Title II). And injunctive relief, in virtually all conceivable circumstances, is exactly tailored to remedy the evil at which Title II is aimed: the denial or unreasonable restriction to disabled persons of access to public services and accommodations.

This case is a good example. The most natural and reasonable remedy for the discrimination that the plaintiffs claim to have suffered – denial of ready entry to public buildings – would be a court order compelling the responsible State officials to make the necessary modifications or other accommodation. Furthermore, any such order would be backed by the threat of federal enforcement to compel compliance. See *id.* § 2000e-5(i).

2. If for some reason injunctive relief were inadequate to remedy a given instance of discrimination – or if it were thought to offer insufficient incentive for compliance – the ADA also provides for federal civil enforcement actions. See *id.* § 2000e-5(f). Without offending the Eleventh Amendment, such an action could result in (among other remedies) civil penalties, as well as costs and fees.

Thus, even assuming the policies embodied in the ADA cannot be properly advanced without the threat of monetary exaction, that threat can be wielded and carried out without the drastic step of abrogating the States' sovereign immunity. Moreover, federal civil enforcement of the ADA, coupled with case-by-case injunctive enforcement, is much surer to advance the Act's policy goals in a targeted and effective manner than the cudgel of private tort suits.

CONCLUSION

For the reasons stated above, and in Petitioner's brief, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

STATE ACCOMMODATION OF THE DISABLED IN PUBLIC BUILDINGS AND FACILITIES[1]

STATE	AUTHORITY	ACCOMMODATION
Alabama	Ala. Code § 21-4-4 (2001)	Requires all public buildings and facilities under construction as of, or constructed after, October 10, 1975 to comply with accessibility standards as promulgated by the State Fire Marshal in conformity with the American National Standards Institute guidelines; granted accessibility waivers for projects in progress where compliance was impractical in light of the stage of completion.
Alaska	Alaska Stat. § 35.10.015 (2002)	Compels the Alaska Department of Public Works to adopt and enforce codes governing the construction of public buildings and facilities to ensure that they "are accessible to, and usable by, the physically handicapped ...."; after June 25, 1976, no public building or facility can be

[1] Descriptions of the statutory provisions reflect their current effective status. References to the legislative history of such provisions are meant to illustrate the duration of state legislative efforts in increasing accessibility of public buildings.

STATE	AUTHORITY	ACCOMMODATION
		designed or constructed in a manner that does not comply with the accessibility standards; requires the Department to maintain an inventory list of public buildings with respect to compliance and to develop cost estimates for retrofitting in order to establish a priority list.
Arizona	Ariz. Rev. Stat. Ann. § 41-1492.01 (2003)	Requires that "all buildings and facilities that are used by public entities and that are leased or constructed in whole or in part with the use of state or local monies" comply with Title II of the ADA; as enacted by 1992 Ariz. Sess. Laws 224 § 4.
Arkansas	Ark. Code Ann. § 19-4-1415, § 20-14-303 (1987)	Requires all public building projects that exceed five million dollars, excluding the cost of land, to comply with the ADAAG, pursuant to 2001 Ark. Acts 1626 § 1, as amended in 2003; establishes that it is the right of "[v]isually handicapped, hearing impaired, and other physically handicapped persons" to have the full use and enjoyment of "public streets, ... public buildings, public facilities, and other public places", subject to certain

STATE	AUTHORITY	ACCOMMODATION
		statutory limitations concerning feasibility; first enacted by 1973 Ark. Acts 484 § 2, as amended in 1979.
California	Cal. Gov't Code §§ 4450-4461 (2003)	Requires all public buildings, subject to certain exceptions, designed and constructed after November 13, 1968, to meet the state building code accessibility standards; requires the renovated sections of buildings built prior to the effective date to comply with the accessibility standards.
Colorado	Colo. Rev. Stat. §§ 9-5-102 to -103 (2003)	Requires public and private buildings subject to these sections to comply with the most current design criteria found in the "American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People"; requires public buildings designed after July 1, 1975, to comply with the standards with exceptions granted on an individual basis; applies standards to buildings under construction prior to July 1, 1976, when such buildings come under renovation or remodeling.
Connecticut	Conn. Gen.	Requires that the State

STATE	AUTHORITY	ACCOMMODATION
	Stat. § 29-269 (2002)	Building Inspector promulgate design and construction accessibility standards in "substantial compliance" with the ADA and that all public buildings "constructed or substantially renovated on or after October 1, 1977," with certain exceptions, comply with such standards; allows the State Building Inspector to approve compliance waivers.
Delaware	Del. Code Ann. tit. 16 § 9502; tit. 29 § 7301, § 7303 § 7306 (2003)	Establishes that it is the right of the "blind, the visually handicapped and otherwise physically disabled" to have the same rights "as able-bodied persons to use ... public buildings, public facilities and other public places"; establishes architectural standards for accessibility to the disabled for buildings (built by or on behalf of the State, leased fully or partially by the State or financed wholly or partially by State bonds) which, after July 13, 1979, have been constructed or altered.
Florida	Fla. Stat. ch. 553.501-553.513 (2002)	Florida Americans With Disabilities Accessibility Implementation Act, passed in 1993, adopted the ADAAG as the law of the state with

STATE	AUTHORITY	ACCOMMODATION
		respect to the minimum standards of the state building code, for the construction and renovation of public buildings.
Georgia	Ga. Code Ann. § 30-3-3 (2002)	Requires "all government buildings, public buildings, and facilities" subject to renovation or construction permits after July 1, 1979 to comply with the ADAAG; required such public buildings subject to renovation or construction between July 1, 1984 and July 1, 1995 to comply with the specified version of the American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People; allows for case-by-case exceptions based on a showing of impracticability.
Hawaii	Haw. Rev. Stat. § 103-50 (2002)	Requires construction and design of "public buildings, facilities, and sites" to be accessible to the disabled, in conformance with the ADAAG; first enacted by 1965 Haw. Sess. Laws 3 § 2, as amended in 1969, 1989, 1993, 1996, 1999 and 2002.
Idaho	Idaho Code § 39-4101,	Adopts the ADA and ADAAG accessibility requirements as

STATE	AUTHORITY	ACCOMMODATION
	§ 39-4109, § 56-702 (2003)	the state building code to be enforced by local authorities, pursuant to 2002 Idaho Sess. Laws 345 § 13; establishes that "the visually handicapped, hearing impaired, and other physically handicapped persons" have the same rights of use able-bodied persons to "... public buildings, public facilities, and other public places"; first enacted by 1969 Idaho Sess. Laws. 69 § 2, as amended in 1984.
Illinois	410 Ill. Comp. Stat. 25 et seq. (2002)	Requires the Capital Development Board to promulgate accessibility standards for all public buildings; stipulated that standards would apply to all newly constructed buildings and certain renovations; first enacted by 1984 Ill. Laws 948 § 1, as amended in 1991.
Indiana	Ind. Code § 22-13-4-1.5 (2003)	By act of 1994 Ind. Act 118 § 3, required the state buildings commission to adopt accessibility standards consistent with the ADAAG.
Iowa	Iowa Code § 104A.1 et seq. (2003)	Requires all public buildings under construction or to be constructed after July 4, 1965, to comply with state accessibility standards to accommodate the disabled.

STATE	AUTHORITY	ACCOMMODATION
Kansas	Kan. Stat. Ann § 58-1301 (2002)	Establishes that all existing (as of 1978) and future public buildings and facilities must comply with minimum accessibility standards, subject to certain exceptions.
Kentucky	Ky. Rev. Stat. Ann. § 198B.260 (2002)	Effective July 15, 1994, requires the Kentucky Board of Housing, Buildings and Construction to promulgate revised accessibility regulations consistent with the ADA and the ADAAG covering the renovation and construction of all buildings with certain limited exemptions (*e.g.* historical structures where the historical significance would be destroyed by compliance); application of earlier state accessibility standards were effective July 15, 1980.
Louisiana	La. Rev. Stat. Ann. § 40:1731 et seq. (2003)	Declares the legislature's intent to remove architectural barriers to the ability of the physically disabled to exercise their rights freely, as established by 1977 La. Acts 625 § 1; requires newly constructed or altered public facilities to comply with the ADAAG, as established by 1990 La. Acts 459, § 1 and 1995 La. Acts 880 § 1.

STATE	AUTHORITY	ACCOMMODATION
Maine	Me. Rev. Stat. tit. 5 § 4553, § 4593 (2003)	Defines buildings or establishments of the State, municipality or other local government as places of public accommodation; required such places that were constructed between Sept. 1, 1974 and Jan. 1, 1982 or that met certain remodeling cost thresholds to meet statutory accessibility standards that concerned walkways, entrances, lavatories, doors and parking.
Maryland	Md. Code Ann art. 83B § 6-102 as replaced by Md. Code Ann. Public Safety § 12-202 (2003)	Mandates Department of Housing and Community Development to promulgate statewide building codes to allow for accessibility by "individuals with disabilities"; such codes are enforceable by the permitting authority; accessibility provisions were first enacted in 1974 and subsequently amended in 1979, 1985, 1986, 1987, 1988 and 1991.
Massachusetts	Mass Gen. Laws. ch. 22 § 13A (2003)	Establishes an architectural access board charged with the promulgation of rules to make public buildings accessible to the handicapped; mandates that no "construction, reconstruction, alteration or remodeling of a public building," subject to certain exceptions, can occur

STATE	AUTHORITY	ACCOMMODATION
		unless it occurs in conformity with such accessibility rules; first enacted by 1967 Mass. Legis. Serv. 724 § 1, as amended in 1971, 1974, 1979, 1981, 1986, 1989, 1990 and 2002.
Michigan	Mich. Comp. laws § 125.1352 (2003)	Requires public facilities, for which construction was contracted after July 2, 1974 and public facilities for which the renovation surpasses certain load requirements, to comply with the "barrier free design requirements contained in the state construction code."
Minnesota	Minn. Stat. § 16B.61, § 256c.02 (2003)	Mandates that the Dept. of Administration implement a building code that provides for all "public buildings constructed or remodeled after July 1, 1963, to be accessible to and usable by physically handicapped persons"; establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places."
Mississippi	Miss. Code Ann. § 43-6-103 (2003)	Required all existing public buildings, contracted-for and under construction, as of July 1, 1972, to have access ramps; requires all public buildings

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		contracted-for thereafter to comply with the state building accessibility codes.
Missouri	Mo. Rev. Stat. § 213.065 (2003)	Makes it an unlawful discriminatory practice to withhold from the disabled any of the "advantages, facilities, services, or privileges made available" in any public facility owned or operated by or on behalf of the state or a public corporation and any facility supported by public funds; first enacted by 1986 Mo. Laws 513, as amended in 1992 and 1998.
Montana	Mont. Code Ann. § 50-60-201 (2002)	Establishes a state-wide building code for "newly constructed public buildings and "certain altered public buildings" to ensure uniformity in access to persons with disabilities; first enacted by 1969 Mont. Laws 366 § 7.
Nebraska	Neb. Rev. Stat § 81-5147 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to public buildings and public facilities; requires promulgation of building code regulations for newly constructed or renovated buildings that are consistent with the "guidelines and standards"

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		of the ADA; enacted by 1998 Neb. Laws 1073, effective April 1, 1998, operative October 1, 1998.
Nevada	Nev. Rev. Stat. § 338.180 (2003)	Declares the intent of the Legislature to make public buildings designed after July 1, 1973, accessible to the disabled; requires all plans, designs and construction of public buildings after July 1, 1973, to comply with the applicable requirements of the ADA and the ADAAG; provides for a non-compliance remedy to private individuals through the attorney general, who may bring suit against the offending state entity.
New Hampshire	N.H. Rev. Stat Ann. § 155-A:5 (2002)	Requires all new buildings constructed by the State to accommodate persons with disabilities with respect to egress and ingress to public areas of such buildings; effective September 14, 2002, as enacted by 2002 N.H. Laws 8:3.
New Jersey	N.J. Rev. Stat. § 52:32-4, 5 (2003)	Requires that "[e]xcept as otherwise provided by law, all plans and specifications for the construction or remodeling of any public building" in New Jersey shall provide facilities for the disabled; mandates

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		promulgation of regulation that prescribe the types of facilities and stipulates that such facilities shall differentiate between "small public buildings" and "large public buildings" as determined by certain square footage thresholds; the earliest version of these provisions was enacted in 1971.
New Mexico	N.M. Stat. Ann. § 28-7-3 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places"; first enacted by 1967 N.M. Laws 232 § 3.
New York	N.Y. Pub. Bldgs. Law § 51 (2003)	Requires that the construction, renovation or alteration of all public buildings conform to the state building codes pertinent to access for the disabled; first enacted by 1972 N.Y. Laws 656, as amended in 1974, 1984 and 1994.
North Carolina	N.C. Gen. Stat. § 168-2, § 168A-7 (2003)	Establishes the right of the physically disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and all other buildings and facilities"; makes it unlawful for a state agency "to refuse to

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		provide reasonable aids and adaptations necessary for a known qualified person with a disability to use or benefit from existing public services operated by such entity; provided that the aids and adaptations do not impose an undue hardship on the entity involved"; first enacted by 1973 N.C. Sess. Laws 493 § 1, as amended in 1991 and 1997.
North Dakota	N.D. Cent. Code § 48-02-19 (2003)	Requires a certificate of compliance with the ADAAG to accompany designs of public buildings; first enacted by 1973 N.D. Laws 376, as amended in 1975, 1977, 1979, 1983, 1989, 1991, and 1993.
Ohio	Ohio Rev. Code Ann. § 3781.111 (2003)	Requires that the board of building standards adopt accessibility standards for all buildings, including public buildings, that are consistent with the ADA; the earliest version of these provisions was enacted in 1965.
Oklahoma	Okla. Stat. tit. 61 § 11 (2002)	Requires all plans for the construction of public buildings, after May 24, 1973, to provide facilities for the "handicapped" in compliance with state building code; requires all existing public build-

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		ings that surpass certain renovation or addition thresholds to comply with the same accessibility standards.
Oregon	Or. Rev. Stat. § 447.210 et seq. (2001)	Establishes minimum accessibility standards for the disabled in public buildings and places, consistent with the ADA; first enacted by 1971 Or. Laws 230 § 2, as amended in 1973, 1975, 1979, 1987, 1989, 1991, 1993 and 1995.
Pennsylvania	71 Pa. Stat. Ann. § 1455.1 (2003)	Requires all newly constructed public buildings to be "accessible to and usable by persons with physical handicaps"; provides that as public buildings are renovated, they shall also comply with the same standards, subject to variances based on practicability; first enacted by 71 Pa. Const. Stat. §§ 1455.3b (1965).
Rhode Isiand	R.I. Gen. Laws § 37-8-15 (2002)	Requires that the design of all public buildings be made accessible to and usable by persons with disabilities in compliance with Title 23, Ch. 27.3 of the Rhode Island Building Code; first enacted by 1964 R.I. Pub. Laws 189 § 1, as amended in 1978 and 1997.
South Carolina	S.C. Code Ann.	Establishes the legislature's intent that persons with

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	§ 10-5-210 et seq. (2002)	disabilities participate fully in society, including the enjoyment of public facilities and buildings; requires the construction and design of public buildings to comply with revised state building codes (compliant with the American National Standards Institute guidelines), except to the extent that such buildings are exempted under federal law; first enacted by 1962 Code § 1-49, as amended in 1974 and 2000.
South Dakota	S.D. Codified Laws § 5-14-13 (2003)	Establishes the ADAAG as the minimum standards for construction to accommodate the physically disabled in public buildings; first enacted by 1965 S.D. Laws 312 § 2, as amended in 1988 and 1994.
Tennessee	Tenn. Code Ann. § 68-120-204 (2003)	Requires any public building "which is constructed, enlarged, or substantially altered or repaired after July 1, 1983" to be designed and constructed in a manner that meets the minimum standards set forth by ANSI.
Texas	Tex. Rev. Civ. Stat. Ann. art. 9102	Requires the state Department of Licensing and Regulation to adopt accessibility standards consistent with ANSI guide-

STATE	AUTHORITY	ACCOMMODATION
	(2003)	lines; mandates that all public buildings, "constructed, or renovated, modified, or altered, in whole or in part on or after January 1, 1970" with the use of public funds, must comply with the revised accessibility codes; allows waivers based on impracticability.
Utah	Utah Code Ann. § 26-29-1 et seq. (2003)	Establishes minimum accessibility standards for all public buildings and facilities that are newly constructed or remodeled with state funds, provided that the extent of compliance in the entire building may vary according to whether most or part of it is subject to renovation; first enacted by 1981 Utah Laws 126 § 28, as amended in 2001.
Vermont	Vt. Stat. Ann. tit. 21 § 273 (2003)	Requires the construction and alteration of all public buildings, including private buildings to be used as public buildings, to conform with the standards of the ADAAG, unless modified by Vermont law; effective June 21, 1988, pursuant to Vt. Acts & Resolves 268 § 5, as amended in 1989 and 1995.
Virginia	Va. Code Ann.	Requires the Department of General Services to establish

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	§ 2.2-1159 (2003)	accessibility standards for buildings that are constructed in whole or in part with public funds; except that local authorities are charged with establishing standards for buildings constructed in whole or in part with local funds; first enacted by 1970 Va. Acts. ch. 539, as amended in 1972, 1977, 1993 and 2001.
Washington	Wash. Rev. Code § 19.27.031, § 70.92.110 (2003)	Requires all public buildings, with certain exceptions, that are constructed or remodeled after July 1, 1976, to comply with minimum accessibility standards, as now defined in the 1994 Uniform Building Code; allowed buildings contracted-for, prior to July 1, 1976 to be exempt from compliance, subject to subsequent renovation.
West Virginia	W. Va. Code § 5-15-4 (2003)	Establishes the right of the disabled to the same use and enjoyment as able-bodied persons to "public buildings, public facilities, and other public places"; the earliest version of these provisions was enacted in 1969.
Wisconsin	Wis. Stat. § 13.48(25t) § 101.13 et	Establishes a program to fund the repair and renovation of state-owned buildings, inclu-

STATE	AUTHORITY	ACCOMMODATION
	seq. (2003)	ding disability access retrofitting; requires the establishment of minimum standards to "facilitate the use of public buildings ... by physically disabled persons"; requires design and construction standards consistent with the American Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped; first enacted by 1971 Wis. Laws 228 §§ 17, 42, 44, as amended in 1973, 1975, 1977, 1981, 1983, 1987, 1993 and 1995.
Wyoming	Wyo. Stat. Ann. § 16-6-501, § 16-6-502 (2003)	Requires the design and new construction or additions to "all buildings for general public use built by the state" to comply with standards set forth in the American Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped; mandates the state fire marshal to review all such plans for approval; first enacted by 1969 Wyo. Sess. Laws 30 § 1, as amended in 1975, 1977 and 1982